KOPERASI SERBAGUNA CUEPACS TANGGUNGAN BHD.

v.

CITY INVESTMENT SDN. BHD.

HIGH COURT MALAYA, SEREMBAN
WONG KIM FATT JC
[CIVIL SUIT NO. 189 OF 1980]
3 MAY 1982

CIVIL PROCEDURE: *Application by defendants to discharge ex parte injunction - Preliminary objection on ground of lack of jurisdiction - Order 35 r. 11 of the Rules of the High Court 1980; whether injunction in nature of Mareva injunction or caveat - Effect of non-disclosure of material fact in ex parte application for injunction.*

This was an application by the defendants for an order to discharge the *ex parte* injunction restraining the defendants from in any way dealing with 100 pieces of land not purchased by the plaintiffs in the housing project in which the plaintiffs had by two agreements purchased a total of 85 housing lots of land.

The background to the application was as follows:

When a dispute arose between the parties regarding the interpretation of certain clauses of the two agreements, the plaintiffs entered a private caveat in respect of all the 85 lots purchased by them. The defendants did not dispute that the plaintiffs had caveatable interests in those lots. But when the plaintiffs also entered a private caveat in respect of the 100 lots not purchased by them, the defendants applied to the Court for the removal of those caveats. Ajaib Singh J had held the defendants entitled to an order for the removal of the caveats on the 100 lots. The plaintiffs appealed to the Federal Court.

The plaintiffs subsequently applied by *ex parte* summons-in-chambers in the present suit for an order of injunction. Ajaib Singh J granted the injunction. The plaintiffs then withdrew their appeal to the Federal Court. Shortly later, the defendants applied to have the injunction discharged on the ground that the plaintiffs omitted to mention in their application for *ex parte* injunction a material fact that their private caveats were ordered to be removed by the Court and that they subsequently withdrew their appeal in the Federal Court.

There was a preliminary objection by the plaintiffs to the application, that the Court had no jurisdiction to hear the application on the ground that it was first heard by Abdul Razak J, who had not given his decision.

Held:

[1] The Court had jurisdiction, as the case fell within the scope to 'other cause' in O. 35 r. 11. The application was accordingly ordered to be heard before the Court based on the affidavits filed in Court.

[2] The injunction must be discharged on the following grounds:

(a) Though the Mareva injunction is applicable in Malaysia *[Zainal Abidin v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 40, injunction in the present case was not in the nature of such an injunction [See *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1976] 2 Lloyd's Rep. 509; [1980] 1 All ER 213]. There was no evidence to show that the defendants were disposing of assets with a view to defeating a possible judgment in favour of the plaintiffs. The injunction was more akin to a caveat. By withdrawing

their appeal to the Federal Court, the plaintiffs had conceded that they had no caveatable interest in the 100 lots and they cannot achieve by injunction what they have failed to achieve by caveats. The balance of convenience was in favour of the defendants.

(b) In the affidavit in support of the injunction the plaintiffs had omitted to disclose that the private caveats in respect of the 100 lots had earlier been removed by order of Ajaib Singh J. The applicant to an *ex parte* injunction is bound to disclose all material facts fully and frankly. [*Sari Artists Film Productions Sdn. Bhd. v. Malaysian Film Industries Sdn. Bhd*. [1974] 1 MLJ 123; *Nagocios Del Mar S.A. v. Doric Shipping Corporation S.A.* [1979] 1 Lloyd's Rep. 331, and *Third Chanderis Shipping Corporation v. Unimarine S.A.* [1979] 2 All ER 972]. Had the above fact been brought to the notice of the Judge, he would not have granted the injunction, for to do so would be to defeat his own order for the removal of the private caveat.

[The application allowed with costs.]

Cases referred to:
Zainal Abidin v. Century Hotel Sdn. Bhd. [1982] 1 MLJ 40
Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. [1976] 2 Lloyd's Rep 509
Sari Artists Film Productions Sdn. Bhd. v. Malaysian Film Industries Sdn. Bhd. [1974] 1 MLJ 123
Nagocios Del Mar S.A. v. Doric Shipping Corporation S.A. [1979] 1 Lloyd's Rep 331
Third Chandris Shipping Corporation v. Unimarine S.A. [1979] 2 All ER 972

Legislation referred to:
Debtors Act 1957, s. 19
National Land Code Act 56/1965, s. 329(2)
Rules of the High Court 1980, O. 35 r. 11

For the applicants/defendants - Porres P. Royan
For the respondents/plaintiffs - Saraswathy Devi

JUDGMENT

Wong Kim Fatt J.C:

This is an application by the defendants which are licensed housing developers, for an order to discharge the *ex parte* injunction restraining the defendants by themselves or by their servants or agents whosoever for agreeing to sell or selling or transferring or in any way dealing with the 100 pieces of land not purchased by the plaintiffs in the housing project in which the plaintiffs had by two written agreements purchased a total of 85 housing lots of land. When the application came up for hearing before me on 2 April 1982, learned counsel for the plaintiffs raised a preliminary objection that I had no jurisdiction to hear it on the that it was first heard by Abdul Razak J, who had not given his decision. Learned counsel for the defendants submitted that the plaintiffs had filed fresh affidavits for hearing before me. He referred to O. 35 r. 11 of the Rules of the High Court 1980, and submitted that the learned Judge had not concluded the case, and that I had jurisdiction to hear the application.

The short answer to that objection is that upon his transfer from Seremban to Kuala Lumpur Abdul Razak J had indicated through his Secretary, who had minuted the file accordingly, that he was unable to conclude the case. I had spoken to the learned Judge personally on 31 March 1982 and he indicated that I should hear this application afresh. In my opinion this case falls within the scope of 'other cause' in O. 35 r. 11. Accordingly, I ordered the application to be heard *de nova* before me based on the affidavits filed in Court.

The background to the present application may be stated briefly as follows. By an agreement in writing dated 24 November 1976, entered into between the defendants as vendors and the plaintiffs as purchasers, the plaintiffs purchased 60 terrace building lots in that piece of undivided land known as Lot 3962, held under Grant No. 15907, Mukim of Rasah, District of Seremban, measuring approximately 50 acres, subject to the terms and conditions contained in the agreement. By another agreement in writing of the same date between the same parties, the plaintiffs agreed to purchase another 11 bungalow building lots and 14 detached building lots respectively in the said Lot 3962, again subject to the terms and conditions in the agreement. It is not in dispute that under these two agreements, the plaintiffs had paid the sum of RM472,000 as land purchase price and another sum of RM674,300 as land development price. The defendants subsequently applied for and obtained sub-division and qualified titles to the said Lot 3962. A dispute arose between the parties in respect of the 85 lots purchased by the plaintiffs concerning the interpretation of certain clauses of the two agreements, which should be dealt with at the trial of the suit.

The plaintiffs then entered a private caveat in respect of all the said 85 lots. The defendants, however, did not dispute that the plaintiffs had caveatable interests in these 85 lots. Accordingly, the defendants did not apply or take any steps to remove the caveat. The plaintiffs also maintained that they had registrable interest in respect of the said 100 lots of land and they accordingly entered private caveats in respect of all these 100 lots not purchased by them but to which they claimed an interest because they contended that the defendants were liable under the agreements to offer these lots in substitution of the 85 lots should any of these 85 lots be not acceptable by the plaintiffs. The defendants then applied to this Court by Origination Motion No. 31 of 1980 for the removal of the caveats in respect of the 100 lots. The application came up for hearing before Ajaib Singh J, who stated that he had no difficulty in arriving at the conclusion that the defendants were entitled to an order for the removal of the caveats on the 100 lots which were not sold to the plaintiffs. The reasons for removing the caveats were stated in the judgment of the learned Judge as follows:

> There was no basis on which the respondents could make any legitimate claim under s. 323 in respect of the 100 lots not purchased by them. The lots in question were not the subject matter of any agreement of sale nor were they related in any way to the performance of the performance of the two agreements whereby the applicants had sold 85 lots to the respondents. The dispute which the parties are having over the 60 terrace and 11 bungalow lots can be of no avail to the respondents. Non-compliance with any term or condition in the agreements which the parties had executed on 24 November 1976 may give rise to a cause of action against the party in default but any non-compliance on the part of the applicants cannot be a ground on which the respondents may base their claim for the entry of private caveats on the 100 lots which have nothing to do with the two agreements.

Being dissatisfied with that decision of the learned Judge, the plaintiffs appealed to the Federal Court in Federal Court Civil Appeal No. 99 of 1980.

The plaintiffs subsequently applied by *ex parte* summons-in-chambers in the present civil suit to this Court for an order of injunction as aforesaid. The main ground for the application appears to be that the plaintiffs were afraid that the remaining lots in the housing project may be disposed of by the defendants which are a limited company with no substantial property against which the plaintiffs may levy execution or which may be substituted for the lots purchased by the plaintiffs. The second ground is that the defendants had not offered alternative lots as required under the terms of the two agreements. In the circumstances Ajaib Singh J. granted the injunction, as prayed. After obtaining the *ex parte* injunction, the

plaintiffs withdrew their appeal to the Federal Court in the said Appeal No. 99 of 1980. Shortly thereafter the defendants applied to the Court to have the injunction discharged. As stated earlier on, the application first came up for hearing before Abdul Razak J in this Court.

The crux of the contention by learned Counsel for the defendants for the discharge of the injunction may be stated as follows. In applying for the *ex parte* injunction the plaintiffs omitted to mention a material fact that the plaintiffs' private caveats were ordered to be removed by the Court and that they subsequently withdrew their appeal in the Federal Court. If the injunction was in the nature of a Mareva injunction then the plaintiffs had not complied with the conditions for obtaining such an injunction. If the injunction obtained by the plaintiffs was in the nature of an attachment again they had not fulfilled the requirements of s. 19 of the Debtors Act, 1957 (Revised-1981). The 85 housing lots purchased by the purchased by the plaintiffs had been allotted to them and had been adopted by them.

Learned Counsel for the plaintiffs argued that no building plans had been approved and that building contracts submitted by the defendants had been varied in material terms. The plaintiffs had an interest in the 100 lots restrained by the injunction as these lots should be offered as substituted lots to the plaintiffs under the terms of the two agreements. She further contended that these substituted lots had been offered and accepted by the plaintiffs and therefore should not be released from the injunction. There is a real question to be tried in the suit and therefore the *status quo* of the parties should be maintained. If the 100 lots were to be released from the injunction the defendants would dispose of them quickly leaving no assets to be attached by the plaintiffs.

In considering whether or not the injunction should be discharged, the question whether the plaintiffs had an interest in the 100 lots of land which must be restrained by an injunction. They were previously protected by private caveats which had been removed. The injunction may be said to act in *personam* while the caveat in *rem*, but the common effects are the same, that is the restraint of dealings affecting these 100 lots of land. In an appeal from the decision of the High Court in *Zainal Abidin v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 40, Raja Azlan Shah CJ (Malaya), in a judgment dated 29 January 1982 in the Federal Court (FCCA No. 189 of 1981), held that the Mareva injunction is applicable in Malaysia and that a defendant is not called upon to prove its solvency the moment it becomes a defendant. The injunction obtained in the present case appears not to be in the nature of a Mareva injunction [see *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep 509, for there is no evidence to show that the defendants are disposing of assets with a view to defeating a possible judgment in favour of the plaintiffs. It is somewhat akin to a caveat in the circumstances of this case in that it restrains the defendants from selling or otherwise dealing with the 100 lots in question. In my judgment, by the withdrawing their appeal in the Federal Court, the plaintiffs had conceded that they had no caveatable interest in the 100 lots of land which they had not purchased. What they had failed to achieve by caveats they cannot now achieve by injunction based on the same ground. If the injunction were a second caveat based on the same ground, it could not have been registered owing to the provisions of s. 329(2) of the National Land Code 1965. On this ground along the balance of convenience is in favour of the defendants and the injunction must therefore be discharged.

There is another ground why the injunction should be discharged, i.e. in the affidavit in support of the *ex parte* application for injunction, it was not disclosed that the private caveats entered by the plaintiffs in respect of the 100 lots of land had earlier on been removed by order of Ajaib Singh J. There is nothing in his notes of hearing to show that counsel had brought this material fact to his attention. Had this fact been brought to his attention, the

learned Judge would not have granted the injunction, for to do so would be to defeat his own order for the removal of the private caveats. The law is clear that in applying for an *ex parte* injunction, the applicant is duty bound to disclose in his affidavit all material facts fully and frankly. (see *Sari Artists Film Productions Sdn. Bhd. v. Malaysian Film Industries Sdn. Bhd.* [1974] 1 MLJ 123; *Nagocios Del Mar S.A. v. Doric Shipping Corporation S.A.* [1979] 1 Lloyd's Rep 331, and *Third Chanderis Shipping Corporation v. Unimarine S.A.* [1979] 2 All ER 972).

It is not necessary for me to deal with other grounds. I must make it clear that in deciding this application, I have not in any way dealt with the merits of the suit which is fixed for hearing soon.

For the above reasons, I would allow this application with costs.

Also found at [1982] CLJ 428